Office-Supreme Court, U.S.
FILED
AUG 10 1981
L. STEVAS,
CLERK

No. 80-1582

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Speedy Trial Clause of the Sixth Amendment applies to a period when a person is not under arrest or formal accusation of a crime.

2. Whether respondent's constitutional right to a speedy trial was violated by the delay between the commission of the crime and the return of the indictment, assuming *arguendo* that the Speedy Trial Clause applies to that entire period.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 632 F.2d 258. The opinion and order on denial of rehearing (Pet. App. 29a-49a) is reported at 635 F.2d 1115. The opinion of the district court (Pet. App. 50a-73a) denying respondent bail pending appeal is reported at 485 F. Supp. 1087. The pretrial opinion of the court of appeals (Br. in Opp. App. 1A-35A) is reported at 531 F.2d 196.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a) was entered on July 29, 1980. A petition for rehearing was denied on December 18, 1980 (Pet. App. 29a). On February 10, 1981, Justice Brennan extended the time

within which to file a petition for a writ of certiorari to and including March 18, 1981. The petition was filed on that date and granted on May 26, 1981 (J.A. 171). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial * * *.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, respondent was convicted on one count of first degree murder and two counts of second degree murder, in violation of 18 U.S.C. 1111. He was sentenced to three consecutive terms of life imprisonment. The court of appeals reversed the convictions and ordered dismissal of the indictment on the ground that respondent's Sixth Amendment right to a speedy trial had been violated.

1. When the murders of which he was convicted were committed, respondent was a physician holding the rank of captain in the United States Army Medical Corps and was stationed at Fort Bragg, North Carolina. In the early morning of February 17, 1970, respondent's pregnant wife, Colette, and two daughters, Kimberly and Kristen, were bludgeoned and stabbed to death in respondent's quarters at the Fort Bragg military reservation.[1] The Army Criminal Investigation Division (CID) and civilian law enforcement authorities immediately began an investigation of the crime.

During a series of interviews between February 17, 1970, and April 6, 1970, respondent told the investigators

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[1] The early background of this case is set out in the decisions rendered before trial. 531 F.2d 196, 200-201 (1976), rev'd, 435 U.S. 850 (1978).

his story of what had happened on the night of the murders. He stated that he had been sleeping on the living room couch when he was awakened by the screams of his wife and older child and that he was attacked by three unknown male assailants and knocked unconscious (GX 1135 at 3-6).[2] He described a fourth intruder as a blond female who wore boots, a floppy hat, carried a candle and chanted "acid is groovy, kill the pigs" (*id.* at 4; Tr. 1270).[3] Respondent gave a detailed account of his actions upon regaining consciousness and discovering first his wife's body and then the bodies of his children (GX 1135 at 6-10).

The investigators also discovered a great deal of physical evidence in the apartment. For example, threads and fibers matching those from the pajama top that respondent was wearing on the night of the murders were found in various areas of the apartment. And the fact that each member of the MacDonald family had a different blood type enabled the investigators to identify the member of the family who was the probable source of each blood stain that was found (see GX 638).

It soon became apparent to CID investigators that many aspects of respondent's story were inconsistent with the physical evidence. For example, respondent had stated that his pajama top had been ripped when he was attacked in the living room and that he awoke to find himself entangled in it; when he discovered his wife's body in the master bedroom, before going into the other rooms, he placed the pajama top over the upper portion of her body (see GX 1135 at 3-13, 28, 68-75). However, threads matching the pajama top had been discovered under Colette's body (see GX 126, 327, 984), in the bedding of both children (see GX 346, 356, 983; GX 362, 982), in a

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[2] "GX" refers to government exhibits introduced at trial. "GX 1135" is the transcript of the taped interview with respondent on the morning of April 6, 1970.

[3] "Tr." refers to the transcript at trial.

pile of bedding in the master bedroom (GX 978) and on a bludgeon found at the outside rear of the apartment (GX 307, 981); no fibers were found in the living room (Tr. 1727-1728). Moreover, 48 punctures were found in the pajama top, many through the rear of the garment apparently caused by an ice pick; yet respondent had sustained only one wound in the right chest and two other minor cuts, none of which appeared to be caused by an ice pick (Tr. 2648-2651, 4055-4067).[4]

Accordingly, on April 6, 1970, respondent was advised of his rights and informed that he was a suspect. He was relieved of his medical duties and restricted to quarters. On May 1, 1970, the Army formally charged respondent with murder, pursuant to Article 30 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 830. As required by Article 32 of the UCMJ, 10 U.S.C. 832, an investigating officer was appointed to conduct an investigation of the charges and to recommend whether they should be referred to a general court-martial for trial.

A hearing was held pursuant to Article 32 at which the government called 27 witnesses and respondent 29, the majority of whom were character witnesses (531 F.2d at 200). Respondent testified and repeated the story that he had told to investigators. Following the Article 32 hearing, the investigating officer filed a report recommending that the charges against respondent be dismissed. The report also recommended that civilian authorities investigate the alibi of a woman named Helena Stoeckley, because the testimony of a neighbor indicated

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[4] In addition, respondent had alleged that he was attacked with a wooden club, but splinters from the club were found only in the bedrooms, not the living room (GX 437, 982, 983; Tr. 1727-1728); Kimberly's blood was found on the pajama top (Tr. 3649-3650); and Kristen's blood was found on respondent's eyeglasses in the living room (Tr. 3507-3508).

that she might have been involved (*ibid.*).[5] On October 23, 1970, after review of the report, the Commanding General of respondent's unit accepted the recommendation and dismissed the charges because of insufficient evidence available to justify their reference to trial by court-martial. See *Manual for Courts-Martial, United States* ¶ 33f (rev. ed. 1969). In December 1970, the Army granted respondent an honorable discharge for reasons of hardship. Respondent then moved to California and established himself as a practicing physician (Pet. App. 55a).

At the request of the Department of Justice, the CID continued its investigation. The investigation was quite extensive, involving several hundred interviews and numerous forensic tests of the evidence found at the crime scene.[6] And, as recommended by the investigating officer,

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[5] William Posey, a former neighbor of Stoeckley's, had testified that he had seen her arrive home in the early morning of February 17, 1970, in a car occupied by several males. He also testified that she sometimes wore a blond wig and floppy hat, although she was not wearing them on that occasion (J.A. 5-11). About a week after the murders, Stoeckley had told him that she had been questioned by police but could not remember what she did that night because she was "stoned out" (J.A. 11-15). When Posey suggested that she could have been the intruder described by respondent who held a candle, Stoeckley nodded her head in a noncommittal manner (J.A. 21-23). William Ivory, a CID agent, testified that he had twice interviewed Stoeckley and that she could not remember her whereabouts on the night of the murders because she was "out on marihuana" (J.A. 25-26). Respondent was shown a picture of Stoeckley at the Article 32 hearing and was unable to identify it (Art. 32 Tr. M26-M28, M141).

[6] The CID investigation determined that surgical glove remnants found near Colette's body in the master bedroom matched the composition of surgical gloves found beneath respondent's sink (Tr. 1743, 1760-1762, 3911-3915), and that the bludgeon used in the murders was a portion of a bed slat from the MacDonald residence (Tr. 3812). In addition, investigators attempted to identify fingerprints found in the MacDonald residence and to determine possible motives for the homicides. During the same

the CID investigated Helena Stoeckley. A CID agent conducted additional interviews with Stoeckley on April 23 and 24, 1971.[7] In June 1972, the CID transmitted to the Justice Department a 13-volume report recommending still further investigation (435 U.S. at 851). After the raw report had been examined by several persons within the Department, the CID was requested to investigate some undeveloped leads. The CID then conducted more interviews and scientific tests and forwarded supplemental reports to the Department on November 9, 1972, and August 20, 1973. Thereafter, after further analysis of the evidence then available, the Department of Justice determined that many unanswered questions in the complex case could be resolved only by the use of the investigative powers of a grand jury. Therefore, in August 1974, a grand jury of the United States District Court for the Eastern District of North Carolina was empanelled to investigate the murders more fully.

During the next several months, approximately 75 witnesses, including respondent, were called to testify. At the same time, the Federal Bureau of Investigation un-

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period, the Federal Bureau of Investigation conducted additional examinations of clothing and other evidence found at the crime scene. Laboratory analysts confirmed that the puncture holes in respondent's pajama top were made while the garment was stationary, that they were made by an instrument like the ice pick found outside his quarters, and that large bloodstains matching Colette's blood type were present on the pajama top before it had been torn (Tr. 4058, 4074-4079).

[7] During the first interview, Stoeckley told the agent that, while she could not recall her activities on the night of February 16-17, 1970, due to a "mental block," she believed that she could have been present during the murders and knew who was involved. She later retracted this statement, explaining that during the period of the murders she was disoriented as to time and place because of drug usage. The following day she again recanted her statement concerning participation in the murders and admitted that she had been lying when she said she knew the identity of the killers; in fact, she only suspected some people of involvement (J.A. 137-141).

dertook an extensive reinvestigation of the crime, which resulted in several significant discoveries. The bodies of the victims were exhumed, and it was determined that a blond hair strand found in Colette MacDonald's hand, which the military investigative officer had cited as supportive of respondent's story about the woman intruder (75-1892 J.A. 140), was in fact Colette's own (Tr. 4105-4110). It was also discovered that when respondent's pajama top was folded in a certain manner, the pattern of the puncture holes in the garment corresponded to the pattern of the ice pick wounds in her chest (Tr. 4185-4188, 4191-4193; see GX 787A). In addition, the government learned for the first time that a crumpled and blood-soaked sheet found in the master bedroom near Colette's body bore bloody fabric impressions of her pajamas, suggesting that she had been carried while wrapped in the sheet (Tr. 4130-4152; GX 825, 978). The sheet also bore fabric impressions in her blood left by respondent's torn pajama top (*ibid.*). Neither discovery could be reconciled with respondent's repeated assertion that he had been wearing the pajama top at the time of the attack on his wife and thereafter had removed it and used it to cover her body.

2. On January 24, 1975, shortly before the fifth anniversary of the murders, the grand jury indicted respondent on three counts of premeditated murder. Prior to trial, respondent moved to dismiss the indictment on several grounds, including double jeopardy and denial of the right to a speedy trial (see J.A. 41-47). The district court denied these motions. On the speedy trial question, the court, relying on *United States* v. *Marion*, 404 U.S. 307 (1971), concluded that "[t]he right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned." See 435 U.S. at 852.

Finding that the issue could properly be appealed before trial, a divided panel of the court of appeals reversed

and remanded with instructions to dismiss the indictment on speedy trial grounds. 531 F.2d 196 (1976) (*MacDonald I*). The court viewed the preferral of military charges against respondent on May 1, 1970, and the attendant restriction of his movement, as "the functional equivalent of a civilian arrest" (531 F.2d at 204). Accordingly, it held that the Sixth Amendment guarantee of a speedy trial attached at that time. Because petitioner remained under suspicion and felt obliged to retain a lawyer after the military charges were dismissed, the court noted that his "freedom from detention" during the years prior to indictment "did not, from a practical standpoint, dispel the effects of the government's initial accusation" (*ibid.*). Therefore, the court held that the delay of more than four and one-half years between the military accusation and the indictment triggered the balancing analysis outlined in *Barker* v. *Wingo*, 407 U.S. 514 (1972), for determining the existence of violations of the Sixth Amendment right to a speedy trial.

Applying the *Barker* analysis, the court of appeals conceded that the government had not deliberately delayed charging respondent in order to hamper the defense (531 F.2d at 205-206). However, the court found that the government had provided no satisfactory explanation for the delay between the transmittal of the CID report to the Department of Justice in June 1972 and the empanelling of the grand jury in August 1974; instead this delay was ascribed to "indifference, negligence, or ineptitude" (531 F.2d at 207). The court also stated that respondent "reasonably asserted his right to a speedy trial" (*ibid.*). Finally, the court found that respondent had been prejudiced by the delay because of the need to retain counsel, the anxiety produced by the threat of a prosecution, and the expectation that "in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details" (*id.* at 207-208). The court concluded that a weighing of these fac-

tors indicated a violation of respondent's Sixth Amendment right to a speedy trial (*id.* at 208).

Judge Craven dissented (531 F.2d at 209-214). He reasoned that because the military charges against respondent had been dismissed in October 1970, and because respondent had "stood under no 'public accusation' " during the ensuing four-year period prior to the indictment, the majority's conclusion that respondent's right to a speedy trial continued unabated from May 1970 until the return of the indictment in January 1975 was incorrect (*id.* at 212-213). Judge Craven viewed respondent's claim as one alleging a violation of due process as a result of pre-indictment delay, which he found unsupported by evidence of actual prejudice (*id.* at 214).[8]

After the Fourth Circuit denied a petition for rehearing en banc by a 3-3 vote, this Court granted certiorari. The Court vacated the decision of the court of appeals, holding that an interlocutory appeal may not be taken from the denial of a motion to dismiss on speedy trial grounds. 435 U.S. 850 (1978). In light of its holding on the appealability issue, the Court did not reach the government's contention that the court of appeals had erred in applying the protections of the Sixth Amendment to the entire period from the military accusation to the indictment. 435 U.S. at 863 n.9. On remand, the court of appeals held that a trial on the federal indictment would not violate the Double Jeopardy Clause. 585 F.2d 1211 (1978).

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[8] Judge Craven also disputed the majority's conclusion that respondent had been subject to the civilian equivalent of arrest as the result of the preferral of military charges and his restriction to quarters. He reasoned that, although a probable cause determination is a prerequisite to an arrest as the term is used in the Sixth Amendment context, no such determination is necessary for preferral of charges under military law. Judge Craven concluded that the Army's inquiry fell "somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest," neither of which activates the Sixth Amendment's speedy trial guarantee. 531 F.2d at 210-213.

3. Respondent's trial commenced in July 1979 after a renewed motion to dismiss on speedy trial grounds (J.A. 48-49) was denied by the district court. The government's case at trial consisted almost exclusively of physical evidence gathered during the exhaustive investigation, together with interpretive scientific testimony. See Pet. App. 16a. This evidence showed that respondent's story of his actions on the night of the murders was a fabrication designed to conceal the fact that he had committed the murders himself. Helena Stoeckley appeared as a defense witness at the trial. She testified that she had ingested large quantities of drugs on February 16, 1970, and repeated her previous statements that she had no recollection concerning her whereabouts between midnight and 4:30 a.m. on February 17, 1970. She denied any involvement in the murders of respondent's family and admitted that her knowledge of the killings was the product of what others had related to her (J.A. 52-54, 102-104, 105).[9] The jury returned a verdict of guilty on one count of first-degree murder and two counts of second-degree murder.

4. After trial respondent moved to vacate the conviction and dismiss the indictment on speedy trial grounds (J.A. 170). The district court denied this motion (Pet. App. 74a-75a), setting forth its reasons in a decision denying respondent bail pending appeal (*id.* at 51a-56a). First, the court pointed out that respondent had suffered neither "oppressive pretrial incarceration" nor "great

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[9] Respondent moved to admit, as declarations against interest under Fed. R. Evid. 804(b)(3), testimony of other witnesses concerning Stoeckley's prior statements to them that suggested her possible involvement in the murders. After hearing on voir dire the testimony of six persons to whom Stoeckley had made vague and contradictory statements concerning her knowledge of the murders (see J.A. 121-169), the trial court ruled the testimony inadmissible on the ground that corroborating circumstances did not indicate the trustworthiness of the statements (Pet. App. 56a-63a); indeed, the court concluded that the statements were "clearly untrustworthy" (*id.* at 61a).

anxiety and concern" because of the pre-indictment delay in that he had spent the majority of the period establishing himself in the practice of medicine in California (*id.* at 54a-55a). Then, noting that it had paid specific attention during the trial to the possibility of prejudice to the defense because of the delay (*id.* at 53a), the court stated that "[t]he fears expressed by the Fourth Circuit in its 1976 decision that [respondent's] ability to defend the case adequately might be seriously prejudiced by the pre-indictment delay have not been borne out in the record developed at trial" (*id.* at 55a).[10] In the absence of any prejudice, the court concluded that respondent's speedy trial claim should be denied.

A divided court of appeals reversed (Pet. App. 1a-27a). The court explicitly adopted the reasoning of the first panel with respect to three of the *Barker* factors—the length of the delay, the reason for the delay, and respondent's assertion of his speedy trial right (*id.* at 4a). It went on to discuss each of these factors briefly. The court emphasized that the "military arrest" of respondent triggered his speedy trial right and thus that the relevant delay was the entire period between "the military arrest and trial" (*ibid.*). The court noted, however, that the "most offending delay" was the two-year period between the transmission of the CID report to the Justice Department and the institution of the grand jury proceeding (*id.* at 8a). The court characterized this delay as the product of "sheer bureaucratic indifference" (*id.* at 7a).

Turning to the question of prejudice to the defense at trial, the court first noted that "[t]he evidence at trial, if anything, confused rather than clarified the question

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[10] Specifically, the court observed that no defense witness died during the delay, that several witnesses "vital to the defense" would have been either unknown or unavailable if the trial had been conducted shortly after commission of the offense, and that respondent had not alleged any particular in which his defense was prejudiced by the delay (Pet. App. 55a-56a).

of actual prejudice at trial" (Pet. App. 9a). The court then explained that "[t]he substantial possibility of prejudice is what controls; it is not incumbent on the defendant to prove that prejudice inescapably took place" (*id.* at 11a). Citing the "almost certain memory erosion" of the witnesses (*id.* at 14a) and the difficulty that respondent would have had, in light of the nine-year delay,[11] in testing the consistency of prosecution witnesses' trial testimony with their original statements, given the risk that the prosecutors had bolstered their recollection in preparing for trial (*id.* at 10a), the court concluded that there was a "substantial possibility that [respondent's] defense was prejudiced by the delay" (*id.* at 14a). In particular, the court noted that the testimony of defense witness Helena Stoeckley "had a great potential for prejudice" (*id.* at 11a). Although the court acknowledged that, within a week of the murders, Stoeckley had told her neighbor Posey that she had no recollection of her activities on the night of the crime and that "[h]er memory has resembled a lightbulb not screwed tight, blinking on and off" (*id.* at 13a), it concluded that "the possibility, indeed the probability, that unreasonable delay was the cause [of Stoeckley's memory gap] cannot be excluded" (*id.* at 13a-14a). The court then noted that the amount of trial prejudice necessary to demonstrate a speedy trial violation depends on the other *Barker* v. *Wingo* factors. Balancing all of those factors, the court of appeals concluded that respondent's Sixth Amendment rights had been violated (*id.* at 16a-17a).

Judge Bryan dissented. First, he disputed the court's view that the lapse of time between the commission of the crime and the indictment was inexcusable. In light of the complexity of the case, Judge Bryan found that the deferral of the submission of the case to the grand

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[11] The court acknowledged that not all of the nine-year delay was attributable to the government, but nonetheless remarked that "all of it contributed to the fading of memories" (Pet. App. 10a n.2).

jury was "well advised" (Pet. App. 21a). Both the government's interest in the investigation and considerations of fairness to the respondent dictated that a grand jury not be convened until the government had gleaned all available evidence (*id.* at 21a-22a). Judge Bryan also rejected the court's conclusion regarding prejudice at trial, finding that respondent's ability to defend himself was in no way prejudiced by the delay (*id.* at 23a-27a).[12]

5. The Fourth Circuit denied the government's petition for rehearing en banc by a 5-5 vote. Chief Judge Haynsworth dissented with a brief statement and Judges Russell, Widener, Hall and Phillips filed a fuller dissenting opinion (Pet. App. 29a-47a). In that opinion, the dissenting judges focused on what they deemed the panel's error in including as relevant to the Sixth Amendment inquiry the period between the dismissal of military charges against respondent in October 1970 and his indictment in January 1975. During this period, the dissent explained, respondent was not under arrest, indictment or any other form of legal accusation, and thus there was no hearing or other proceeding pending that he could demand be held speedily; in short, "there was nothing to which a claim for a speedy trial could attach" (*id.* at 33a). Citing decisions of other courts of appeals on this point, the dissent concluded that a Sixth Amendment speedy trial claim cannot be predicated upon delay

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[12] Focusing specifically on witness Stoeckley's inability to recall her activities on the night of the murders, Judge Bryan observed that she had testified that her memory gap resulted from her consumption of large quantities of drugs that night, and that the statements concerning the murders that she had made during the intervening years were "vague, fragmented and contradictory" (Pet. App. 26a). Thus, the record in no way indicated that the passage of time had weakened Stoeckley's recollection of the events of February 17, 1970; rather, her own testimony indicated "a pre-existing gap in her ability to recount those events" (*id.* at 26a-27a & n.5).

that occurs when the defendant is not subject to any restraint or legal accusation. Rather, if a defendant is prejudiced by such a delay, his claim is one of deprivation of due process under the Fifth Amendment (*id.* at 38a-39a).

The dissenters went on to address the Sixth Amendment question on the assumption, *arguendo*, that the panel had correctly applied that provision to the period of pre-indictment delay. First, they concluded that, in light of the complexity of the case and the need to proceed with great care so as not to absolve a guilty party or unfairly charge an innocent party, the government was not guilty of excessive delay in beginning the prosecution (Pet. App. 41a-44a). Second, with respect to the prejudice resulting from the delay, the dissenters explained that respondent had not suffered oppressive pretrial incarceration, nor any anxiety different from that suffered by any person under criminal investigation, nor, as explained in Judge Bryan's dissent, any prejudice to his defense as a result of the pre-indictment delay (*id.* at 45a-46a).

Chief Judge Haynsworth expressed his "tentative agreement" with the government's contention that the period between the dismissal of the military charges against respondent and the return of the indictment is irrelevant for Sixth Amendment purposes (Pet. App. 29a-30a). Judge Murnaghan, author of the panel opinion, filed a statement (*id.* at 48a-49a) clarifying that the panel considered in its Sixth Amendment analysis only the delay prior to the January 1975 indictment.[13]

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[13] It has been conceded by respondent that the delay between the indictment and trial was not the responsibility of the government (see *id.* at 19a n.2; 531 F.2d at 202).

SUMMARY OF ARGUMENT

I.

A. By its terms, the Speedy Trial Clause applies only to a period when a criminal prosecution is underway. In the absence of charges pending against an accused, he is not, in the constitutional language, "in [a] criminal prosecution[ ]," and accordingly there is nothing to which a speedy trial claim can attach. Thus, in *United States* v. *Marion*, 404 U.S. 307 (1971), this Court held that a lengthy period of pre-accusation delay could not constitute a violation of the Sixth Amendment. The Court explained that the institution of formal charges by arrest or indictment subjects the accused to certain consequences not otherwise present, such as a serious interference with his liberty and the public obloquy that attends a formal accusation. The Court concluded that "it is either a formal indictment or information or else the actual restraints imposed by arrest and *holding to answer a criminal charge* that engage the particular protections of the speedy trial provision of the Sixth Amendment" (*id.* at 320; emphasis added).

The same reasons that underlie the proposition that the speedy trial guarantee is not engaged until formal accusation of a crime indicate that the Speedy Trial Clause no longer applies after a criminal proceeding has been terminated. Here, for example, once the military charges against respondent were dismissed, he was no longer the subject of public accusation and his liberty was not restricted. The "public obloquy" that arose from the preferral of charges was presumably eliminated by the public dismissal of those charges and the honorable discharge issued to respondent by the Army, and respondent was able to resume his personal and professional life. There simply were no longer any charges on which respondent speedily could be tried.

The court of appeals' contrary conclusion that the Speedy Trial Clause applies to the period when no charges were pending against respondent is based on the anxiety and expense incurred by him because he knew that he remained under suspicion for the crimes. This reasoning is directly contrary to the very distinction drawn by this Court in *Marion*, because the same considerations apply to any individual known to be the subject of an ongoing investigation. It is true that delay may cause prejudice when no charges are pending against an individual, but the primary protection against such prejudice is the statute of limitations. Moreover, such delay is subject to the constraints of the Due Process Clause; the Sixth Amendment simply has no application to a period when no charges are pending. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 (1977).

B. Application of the Speedy Trial Clause to a period after charges have been dismissed would also have a substantial adverse impact upon the administration of justice. Just as there may be sound policy reasons for postponing the commencement of a prosecution, it is also desirable in many cases to dismiss charges after a person has been arrested or formally charged. A witness may become unavailable or new evidence may come to light that alters the basis for the original decision to bring charges. But these exercises of prosecutorial discretion will be greatly discouraged if the Speedy Trial Clause continues to apply after dismissal. Rather than forfeit the government's right to try the accused at any time, prosecutors will have an incentive to proceed with prosecutions that otherwise might have been dismissed pending further investigation. The result will be deleterious to both defendants and the government. In some cases, persons will be prosecuted who might never have been brought to trial if the investigation had been permitted to run its course. In other cases, guilty defendants will be acquitted because of the government's inability in the short time after arrest to develop compelling proof of guilt.

Congress gave deference to these policy concerns when it enacted the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, "to give effect to the sixth amendment right to a speedy trial." S. Rep. No. 93-1021, 93d Cong., 2d Sess. 1 (1974). The Act provides that if charges are dismissed and then later reinstituted, the intervening period when no charges are pending is not counted in the speedy trial calculations. 18 U.S.C. 3161(d) and 3161(h)(6). This rule intelligently advances the interests protected by the Sixth Amendment and, in our view, reflects the proper interpretation of the constitutional provision.

II.

If the Court agrees with our submission that the Speedy Trial Clause does not apply to a period when no charges are pending against an individual, it is clear that respondent's speedy trial rights have not been violated. If the Court rejects our submission, however, it is necessary to examine the speedy trial factors enunciated in *Barker* v. *Wingo*, 407 U.S. 514 (1972). In our view, the court of appeals misapplied those factors and erred in finding a Sixth Amendment violation.

The reason for the delay should not be weighed heavily against the government in this case. Most of the period after the dismissal of the military charges was spent in a massive investigation of a complex crime. The CID submitted investigative reports to the Department of Justice in June 1972, November 1972 and August 1973, and some important discoveries in the case were not made until a grand jury was convened in August 1974. In light of the complexity of the case and the gravity of a decision to seek an indictment, the government was "well advised" (see Pet. App. 21a) to postpone convening the grand jury until it had investigated all leads and carefully considered all views as to the wisdom of seeking an indictment, and the delay here was "not * * * excessive" (*id.* at 44a).

The court of appeals' conclusion that respondent asserted his right to a speedy trial, the third *Barker* factor, demonstrates the incongruity of applying the speedy trial analysis to a period when no charges are pending. The court's conclusion was based on letters by respondent's counsel to the Department of Justice asking about the progress of the investigation or urging the government to terminate the investigation on the ground that the military proceeding had established respondent's innocence. These hardly constituted demands by respondent, who had fiercely and successfully resisted institution of court-martial proceedings, that he be charged and tried by civilian authorities.

Finally, there is no basis for finding that respondent was prejudiced by the delay in any respect. Despite this Court's admonition that a claim of impaired defense must be analyzed in light of the facts as developed at trial (*United States* v. *MacDonald*, 435 U.S. 850, 858 (1978)), the court of appeals rested its decision primarily on general speculation about potential problems always present when there is delay. The record does not support the assertions that respondent was prejudiced by the inability of witnesses to testify to recollection independent of that reflected in previous statements (see Pet. App. 10a) or by the "almost certain memory erosion" of all the witnesses (*id.* at 14a). The one specific item of prejudice identified by the court of appeals, defense witness Helena Stoeckley's failure to exculpate respondent, is flatly refuted by the record. Numerous statements made by Stoeckley shortly after the murders demonstrate, as the dissenters on rehearing noted (*id.* at 46a), that her failure at trial to recall her whereabouts on the night of the murders was not "a condition which developed as a result of any delay." Rather, it reflected a "pre-existing gap" in her memory (*id.* at 27a n.5).

ARGUMENT

I

THE SPEEDY TRIAL CLAUSE OF THE SIXTH AMENDMENT DOES NOT APPLY TO A PERIOD WHEN A PERSON IS NOT UNDER ARREST OR OTHER FORMAL ACCUSATION OF A CRIME

The court of appeals' inclusion in its speedy trial calculations of the period from October 1970 to January 1975, when respondent was not under arrest, indictment or any other legal restraint or formal charges, constitutes a serious misapplication of the Speedy Trial Clause of the Sixth Amendment. The court of appeals' decision is at odds with the language of the Constitution and the applicable decisions of this Court. Moreover, if allowed to stand, it will have a substantial detrimental impact upon the effective administration of the criminal laws by inhibiting prosecutors from exploring all avenues of inquiry, both favorable and unfavorable to a suspect, before proceeding with criminal charges.

A. The Sixth Amendment Speedy Trial Guarantee is Designed to Ensure the Expeditious Resolution of Pending Criminal Charges

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *." As this Court explained in *United States* v. *Marion*, 404 U.S. 307, 313 (1971), "[o]n its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." And the history of the Speedy Trial Clause confirms that the constitutional guarantee applies only when a criminal prosecution against an accused is underway. See *id.* at 313-320; *Klopfer* v. *North Carolina*, 386 U.S. 213, 223-226 (1967). Accordingly, the Court in *Marion* rejected the defendant's contention that

the period of pre-indictment delay had violated his constitutional right to a speedy trial. In *Dillingham* v. *United States*, 423 U.S. 64 (1975), the Court reaffirmed its statements in *Marion* that the protections of the Speedy Trial Clause apply during a period when charges are pending against a defendant after his arrest, even though he has not yet been indicted. But this Court has steadfastly refused to apply the Speedy Trial Clause to a period when a defendant is not subject to a public accusation. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 (1977).

The Court in *Marion* recognized that pre-accusation as well as post-accusation delay can have an adverse impact on a defendant. The loss of exculpatory evidence, the death of witnesses with favorable testimony and the impairment of memories resulting from delay can harm a defendant's ability to defend himself whether the delay is before or after he is formally accused. But the Court concluded that "this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context" by extending it to pre-accusation delay. 404 U.S. at 321-322. The Sixth Amendment requirement that the government speedily dispose of criminal charges simply makes little sense when no such charges are pending.

The Court explained the rationale for the Constitution's focus on post-accusation delay as follows (404 U.S. at 320; emphasis added): "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. * * * So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and *holding to answer a criminal charge* that engage the particular protections of the speedy trial provision of the Sixth Amendment." It is

only the maintenance of formal charges that implicates these concerns to such an extent that the speedy trial guarantee is invoked. Thus, the Court drew a sharp distinction between persons against whom charges are pending and persons who are only the subject of a criminal investigation. A citizen not subject to formal charges "suffers no restraints on his liberty and is not the subject of public accusation"; therefore, for Sixth Amendment purposes, "his situation does not compare with that of a defendant who has been arrested and *held to answer*." *Id.* at 321 (emphasis added).[14]

The same reasons that underlie the proposition that the speedy trial guarantee is not engaged until formal accusation of a crime suggest that the Speedy Trial Clause no longer applies after a criminal proceeding has been terminated. The particular consequences triggered by the institution of criminal charges are largely dispelled; the individual is no longer the subject of public accusation and suffers no interference with his liberty.

Here, for example, once the military authorities determined in October 1970 that there was insufficient evidence to warrant referral of the charges against respondent to a general court-martial, his interest in securing a speedy trial on those charges was extinguished. With the dismissal of the military charges, respondent was no longer publicly accused of any crime, nor was his liberty in any way restricted.[15] To the contrary, he was restored to his

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[14] The Court's opinion in *Marion* makes clear that it is not arrest in itself, but rather arrest together with the filing of charges, that activates the speedy trial guarantee. Certainly if a person were arrested and immediately released without a complaint being filed, no speedy trial right would attach. In such a situation, even the Sixth Amendment right to counsel does not attach. See *Gerstein* v. *Pugh*, 420 U.S. 103, 119-122 (1975); *Kirby* v. *Illinois*, 406 U.S. 682, 688-689 (1972) (plurality opinion).

[15] As noted in our petition (Pet. 20 n.12), we assume for the purposes of this case that the protections of the Sixth Amendment were initially triggered when respondent was charged by the military in May 1970, although Judge Craven's dissent in *MacDonald I* casts doubt on this conclusion. See 531 F.2d at 209-214.

duties as a military physician with the rank of captain until he was honorably discharged for reasons of hardship in December 1970. Thereafter, as the trial judge observed (Pet. App. 55a), he moved to California, where he promptly established himself in the practice of medicine and made many friends. Whatever stigma may have resulted from the preferral of charges and the attendant publicity was presumably eliminated by the public dismissal of those charges and the official acknowledgement that respondent's conduct during his term of military service had been honorable. From the time of the dismissal of the military charges in October 1970 until respondent's indictment by a grand jury in January 1975, there simply was no formal accusation of wrongdoing upon which he could have been tried and thus nothing to which his speedy trial claim could attach (see Pet. App. 33a).[16] Under these circumstances, the decision below that respondent's right to a speedy trial nevertheless continued to run between October 1970 and January 1975 "wrench[es] the Sixth Amendment from its proper context." *United States* v. *Marion*, *supra*, 404 U.S. at 322. See generally *Fourth Circuit Review—Misapplication of the Constitutional Rights to a Speedy Trial*, 38 Wash. & Lee L. Rev. 563, 586-587 (1981).[17]

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[16] Indeed, respondent's honorable discharge in 1970 permanently terminated the ability of military authorities to bring charges against him. *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22-23 (1955).

[17] The dismissal of the charges against respondent makes this case quite different from *Klopfer* v. *North Carolina*, *supra*, where, although the defendant had been discharged from custody, the indictment against him remained outstanding and he could have been brought to trial at any time at the whim of the prosecutor. As Justice Harlan noted, the unusual North Carolina procedure involved in *Klopfer* allowed "state prosecuting officials to put a person under the cloud of an unliquidated criminal charge for an indeterminate period." 386 U.S. at 227 (Harlan, J., concurring). *Dillingham* v. *United States*, *supra*, is similarly inapposite. There, the defendant had charges pending against him without interruption for 22 months between his arrest and indictment.

The fact that the Speedy Trial Clause does not apply to a period when no charges are pending does not strip defendants of protection against excessive or oppressive delay. The "primary guarantee against bringing overly stale criminal charges" is the statute of limitations. *United States* v. *Ewell*, 383 U.S. 116, 122 (1966); see also *United States* v. *Lovasco*, *supra*, 431 U.S. at 789; *United States* v. *Marion*, *supra*, 404 U.S. at 322.[18] Moreover, unfair pre-accusation delay is subject to the constraints of the Due Process Clause of the Fifth Amendment. See *United States* v. *Lovasco*, *supra*. But the specific protections of the Sixth Amendment can have no application when there are no charges that can speedily be tried.

The court of appeals' decision that the Speedy Trial Clause applies to the period during which no charges were pending against respondent is a sharp departure from these well-established principles. The only justification given for this result was the conclusion in *MacDonald I* that the dismissal of the military charges did not "dispel the effects of the government's initial accusation." 531 F.2d at 204. In support of this conclusion, the court observed that respondent "realized that the favorable conclusion of the Article 32 proceeding was not the end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his own expense for his continuing defense. He remained under suspicion and was subjected to the anxiety of the threat of another prosecution." *Ibid.* (footnote omitted). The court below gave no more specific explanation of its inclusion of this period in

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[18] We note in this connection that there is no period of limitations applicable to the grave offenses with which respondent was charged. 18 U.S.C. 3281. See *United States* v. *Provenzano*, 423 F. Supp. 662, 664-666 (S.D.N.Y. 1976), aff'd, 556 F.2d 562 (2d Cir. 1977) (where statute provides for death penalty, 18 U.S.C. 3281 applies even though death penalty cannot constitutionally be imposed) (dictum). Nevertheless, the indictment here was returned within five years from the date of the slayings.

its speedy trial calculations. However, in his statement on denial of the petition for rehearing, Judge Murnaghan echoed this theme, noting that "[t]he immense publicity and the continued inquietude because the matter was not put to rest engaged the tenets of the Sixth Amendment" (Pet. App. 49a).

Even assuming these descriptions accurately reflect respondent's position between October 1970 and January 1975, they provide an inadequate basis for applying the Speedy Trial Clause to that period. His situation was no different from that of any individual who, although not yet arrested or formally charged with a crime, is aware that he is the subject of an ongoing investigation for a serious offense. The targets of such inquiries surely suffer anxiety at the prospect of future arrest, indictment and prosecution, and prudence frequently obliges them to retain attorneys. In many cases, the offense may be highly publicized, and known targets of the investigation will be subjected to intrusive and unfavorable publicity.

This Court has considered and rejected the contention that these considerations engage the "particular protections" of the Speedy Trial Clause. *United States* v. *Marion*, *supra*, 404 U.S. at 320. In *Marion*, a government investigation of fraudulent business practices had been the subject of widespread publicity well before the criminal charges were actually brought. More than two years prior to the indictment, a series of newspaper articles concerning the investigation had appeared. These articles, which named the defendants' company, had quoted the United States Attorney as predicting that indictments would soon be forthcoming. Moreover, almost two years prior to the indictment, the defendants had been asked by the United States Attorney's Office to submit business records pertinent to the investigation, and one defendant had been interviewed by the investigators. See 404 U.S. at 309. Thus, the defendants in *Marion* certainly suffered anxiety, adverse publicity, and incurrence of legal expenses of the same kind as that suffered

by respondent after the charges against him were dismissed. Yet this Court explicitly held that these harmful consequences did not implicate the protections of the Speedy Trial Clause. *Marion* stands for the proposition that the situation of a citizen who suffers "no restraints on his liberty and is not the subject of public accusation * * * does not compare with that of a defendant who has been arrested and held to answer." 404 U.S. at 321. The conclusion of the court of appeals that the protections of the Sixth Amendment are activated by the harmful consequences of the continuing investigation of respondent's involvement in the murders thus obliterates the very distinction drawn in *Marion*. See *United States* v. *Elsbery*, 602 F.2d 1054, 1059 (2d Cir.), cert. denied, 444 U.S. 994 (1979).

The other courts of appeals that have addressed this issue generally have followed the logical implications of *Marion* and have held that the Sixth Amendment speedy trial protection does not extend to a period when no charges are pending. In *United States* v. *Martin*, 543 F.2d 577 (6th Cir. 1976), cert. denied, 429 U.S. 1050 (1977), the defendant was charged with an offense in August 1972, but those charges were dismissed in January 1973. He subsequently was indicted in December 1974. In rejecting the defendant's claim that his Sixth Amendment right to a speedy trial had been denied, the court stated (543 F.2d at 579): "The Sixth Amendment right to a speedy trial does not attach until the formal charge, the trial of which is alleged to have been inordinately and prejudicially delayed, is made. * * * Because there was no indictment which could have been tried in the period between January 1973 and December 1974, we cannot say that a speedy trial was delayed during that time." [19]

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[19] Contrary to respondent's contention (Br. in Opp. 13), *Martin* has not been overruled *sub silentio* by *United States* v. *Roberts*, 548 F.2d 665 (6th Cir.), cert. denied, 431 U.S. 920 (1977). In *Roberts*, the Court summarily rejected a speedy trial claim on the ground

In *United States* v. *Bishton*, 463 F.2d 887 (D.C. Cir. 1972), the defendant was reindicted on federal charges after the initial charges against him brought under District of Columbia law had been dismissed on jurisdictional grounds. In rejecting the claim that the defendant's right to a speedy trial had been violated, the court declined to consider for speedy trial purposes the period after the first prosecution had been terminated but before the second had begun. Noting that "during this time appellant was a free man against whom no prosecution was pending," the court concluded that "[w]hen a citizen stands neither arrested nor indicted for an offense, he 'suffers no restraints on his liberty and is not the subject of public accusation; his situation does not compare with that of a defendant who has been arrested and held to answer.' United States v. Marion, *supra*, [404 U.S.] at 321." 463 F.2d at 891.

In *United States* v. *Hillegas*, 578 F.2d 453 (2d Cir. 1978), the defendant was first charged with an offense in April 1974, but the complaint was dismissed a month later when two government informants ceased cooperating with the prosecution. The defendant was later indicted in October 1977, when the testimony of those witnesses again became available. The defendant claimed that the district court's speedy trial plan had been violated. In considering the significance of the delay of more than three years between the dismissal of the complaint and return of the indictment, the court of appeals observed:

> After the Government's dismissal of the complaint against him appellant * * * was no longer under any of the restraints associated with arrest and the pendency of criminal charges against him. He was

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that no prejudice had been shown by the delay between arrest and indictment. The case thus cannot reasonably be read to hold that pre-indictment delay after the original charges have been dropped could support dismissal on speedy trial grounds—an issue not even mentioned in the opinion.

> free to come and go as he pleased. He was not subject to public obloquy, disruption of his employment or more stress than any citizen who might be under investigation but not charged with a crime. Unless and until a formal criminal charge was filed against him, neither he nor the public generally could have any legitimate interest in the prompt processing of a nonexistent case against him.

Id. at 458 (footnote omitted). Accordingly, the court concluded that dismissal of the charge in May 1974 tolled the government's obligation to bring the defendant to trial within the time limits fixed by the plan. See also *United States* v. *McClean*, 528 F.2d 1250, 1258 (2d Cir. 1976); *United States* v. *Flores*, 501 F.2d 1356, 1359-1360 (2d Cir. 1974).[20]

The Ninth Circuit has also adopted the view that the Speedy Trial Clause does not apply to a period when no charges are pending. In *Arnold* v. *McCarthy*, 566 F.2d 1377, 1383 (9th Cir. 1978), the court held that the Speedy Trial Clause did not apply to the period between the dismissal of an indictment and a subsequent indictment one year later. The court explained that "[a]fter the dismissal [the defendant] was no longer 'accused'; he no longer had any right to demand a speedy trial under the Sixth Amendment." *Id.* at 1383.[21] Only the Fifth Circuit has demonstrated any uncertainty over this issue. Compare *United States* v. *Nixon*, 634 F.2d 306, 309 (5th Cir. 1981), petition for cert. pending, No. 80-2002 (filed May 27, 1981), and *United States* v. *Avalos*, 541 F.2d 1100, 1108-1109 n.13 (5th Cir. 1976), cert.

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[20] *Hillegas* technically involved application of the district court's local prompt disposition rules rather than the Sixth Amendment, but it is clear from the court's decision that the same analysis would be applied to a constitutional speedy trial claim. See 578 F.2d at 457.

[21] The Ninth Circuit has since suggested that *Arnold* would not necessarily be controlling where the dismissal of the original charges does not follow the declaration of a mistrial. *United States* v. *Henry*, 615 F.2d 1223, 1233 n.13 (1980).

denied, 430 U.S. 970 (1977) (dismissal of indictment does not toll speedy trial calculation if defendant is reindicted on same charge), with *United States* v. *Davis*, 487 F.2d 112, 116 (5th Cir. 1973), cert. denied, 415 U.S. 981 (1974) (Sixth Amendment analysis applied to period from date of second indictment). In sum, decisions of this Court and of the courts of appeals clearly establish that the Speedy Trial Clause has no application to a period when no charges are pending.[22]

B. Extension of the Speedy Trial Clause to the Period After Charges Against An Accused Have Been Dismissed Would Have a Substantial Adverse Impact Upon the Administration of Justice

In *United States* v. *Lovasco*, *supra*, 431 U.S. at 791-796, this Court pointed out that there are sound reasons for not requiring a prosecutor to file criminal charges as soon as probable cause is established to his satisfaction, or, indeed, even when he believes he has assembled sufficient evidence to prove guilt beyond a reasonable doubt. For example, insisting on immediate prose-

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[22] Of course, the Fifth Amendment Due Process Clause does protect defendants against unfair delay during a period when no charges are pending. When charges are dismissed by the government in order to gain an unfair tactical advantage over the defendant (see *United States* v. *Lovasco*, *supra*, 431 U.S. at 795), delay after dismissal of the charges is correctly considered in assessing a due process claim. Two cases have found that when indictments in the District of Columbia were dismissed in order to gain a more favorable prosecutorial forum in Florida, the resulting delay between indictments should be weighed against the government. *United States* v. *Avalos*, *supra*, 541 F.2d at 1108-1109 n.13; *United States* v. *Lara*, 520 F.2d 460, 464-465 (D.C. Cir. 1975). While such delay certainly is material to the Fifth Amendment analysis, we disagree with those cases to the extent that they suggest that the period after dismissal should be considered under the Sixth Amendment. In any event, those cases have no application here, where there is no contention that any delay was the result of a deliberate attempt to secure a tactical advantage by the government.

cution once sufficient evidence is developed to support conviction would pressure prosecutors into resolving doubtful cases in favor of early, perhaps unwise, prosecutions. Prosecutors would be unable adequately to evaluate factors that bear upon the charging decision and might have to ignore factors, such as the availability of a witness, that make immediate prosecution inadvisable. See generally ABA Project on Standards for Criminal Justice, *The Prosecution Function* § 3.9 (Approved Draft 1971).

Such considerations also constitute legitimate reasons for dismissing a criminal case after a person has been arrested or formally charged. Arrests may be made improperly or indictments obtained prematurely.[23] Even when an arrest or indictment is proper, the government may decide not to pursue the case because subsequent and considered judgment determines that the evidence, although sufficient to provide a basis for a charge, may not be sufficient to persuade a jury of guilt beyond a reasonable doubt. In other instances something may occur that alters the basis for the original decision to file charges, such as a witness becoming unavailable or new evidence coming to light. Or non-evidentiary factors, such as the character and apparent motives of the particular defendant or the likelihood of his prosecution for the same offense by another jurisdiction, could indicate that a criminal prosecution would not be in the public interest.

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[23] This case presents a particularly good illustration of why policy considerations militate against barring a prosecution because charges had earlier been filed prematurely and dismissed. The Justice Department did not control the antecedent military proceedings and did not consider respondent's case until the military charges were dropped. Thus, this case is somewhat analogous to one where a federal indictment follows the dismissal of charges by a state. In such a case, the speedy trial protection attached to the federal prosecution does not date from the state arrest. See *United States* v. *Rowell*, 612 F.2d 1176, 1180 (7th Cir. 1980). See generally *Fourth Circuit Review—Misapplication of the Constitutional Rights to a Speedy Trial, supra*, 38 Wash. & Lee L. Rev. at 582-583 & n.186.

See *United States* v. *Lovasco*, *supra*, 431 U.S. at 793-794 & n.15. Such dismissals are beneficial to both the defendant and the government. A defendant is released from a pending charge and its attendant anxiety, expense, and infringement of liberty. The government is given an opportunity to continue its investigation and to reassess its decision not to prosecute if new evidence is discovered.

Under the court of appeals' decision that a defendant's speedy trial rights, once triggered by an arrest or the institution of formal charges, continue to run despite dismissal of the charges, this salutary practice will be discouraged. Prosecutors will be induced to bring cases to trial to avoid the risk of dismissal on speedy trial grounds even when it might otherwise be appropriate to dismiss the charges to permit further investigation. The result will be that individuals who would otherwise not be tried at all may be subjected to the financial and emotional burdens of a trial. In other cases, guilty defendants will be acquitted because of the government's inability in the period directly following arrest to develop compelling proof of guilt. Even if the prosecutor does elect to dismiss the charges in order to develop additional evidence, the investigation will have to be conducted in a hurried atmosphere. Moreover, law enforcement officials will be dissuaded from reopening cases in light of the discovery of new evidence of guilt, even though prosecution would not be barred by the statute of limitations, because of a fear that a conviction would not stand in the face of a speedy trial claim.

Congress paid heed to these policy concerns when it enacted the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, "to give effect to the sixth amendment right to a speedy trial for persons charged with criminal offenses * * *." S. Rep. No. 93-1021, 93d Cong., 2d Sess. 1 (1974). In establishing strict time limits to govern the prosecutorial process once a defendant has been accused, Congress specifically addressed the situation where

a charge is filed and then dismissed. Section 3161(d) provides that the time limits run anew if an indictment or information is dismissed on the defendant's motion, or if a complaint is dismissed or otherwise dropped prior to indictment, and the defendant is subsequently charged with the same offense.[24] Similarly, Section 3161(h)(6) provides that "any period of delay from the date the charge was dismissed [upon motion of the government] to the date the time limitation would commence to run as to the subsequent charge * * *" is excludable for computing the time within which a trial must commence. In its discussion of Section 3161(d), Congress explained the policy reasons that necessitate exclusion of these periods from speedy trial consideration: "To require a prosecutor to conform to indictment and trial time limits which were set by the filing of the original complaint in order to reopen a case on the basis of new evidence would be an insurmountable burden." S. Rep. No. 93-1021, *supra*, at 33.

The rules established in the Speedy Trial Act intelligently advance the interests protected by the Sixth Amendment and, in our view, reflect the proper inter-

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[24] 18 U.S.C. (Supp. III) 3161(d)(1) provides:

> If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

Sections 3161(b) and (c) generally require indictment to occur within 30 days of arrest and trial to occur within 70 days of indictment.

pretation of the constitutional provision.[25] The defendant's rights are safeguarded; the failure to measure the speedy trial period from the date of the initial arrest does not give the government an opportunity to circumvent the speedy trial requirement by successively dismissing and reinstituting a complaint or indictment for the same offense. Cf. *United States* v. *Avalos*, *supra*, 541 F.2d at 1108-1109 n.13. The Act prevents such an infringement of the speedy trial right because when a charge dismissed at the behest of the prosecutor is later reinstated, the time that has elapsed between the filing of the initial charge and its dismissal is included in considering the defendant's right to a speedy trial on the second indictment. See S. Rep. No. 93-1021, *supra*, at 38. This period prior to dismissal of an indictment by a prosecutor may also be appropriately considered in the constitutional speedy trial analysis when the charge is reinstituted. But there is no basis in either law or policy for including the period when no charge is pending in the speedy trial calculation.

II

EVEN IF THE DELAY BETWEEN DISMISSAL OF THE CHARGES AGAINST RESPONDENT AND HIS SUBSEQUENT INDICTMENT IS PROPERLY INCLUDED IN THE SPEEDY TRIAL CALCULATION, RESPONDENT'S SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED

If the Court agrees with our submission that a period when no charges are pending against an individual should not be included in the speedy trial calculation, it is clear that the court of appeals erred in dismissing the indictment on speedy trial grounds. In *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972), this Court identified four fac-

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[25] These provisions generally embody recommendations of the American Bar Association. See ABA *Project on Standards for Criminal Justice, Speedy Trial* §§ 2.2(b), 2.3(f) (Approved Draft 1968).

tors that are relevant in assessing a claim under the Speedy Trial Clause: the length of the delay, the reason for the delay, the defendant's assertion of his rights, and prejudice to the defendant. The length of the delay is a "triggering mechanism"; if the delay is long enough that it is "presumptively prejudicial," analysis of the other factors is necessary to determine whether there has been a speedy trial violation. See *id.* at 530. If the pre-indictment delay here between October 1970 and January 1975 is not included in the calculus, it cannot seriously be contended that respondent's speedy trial rights have been violated. The period between preferral of the military charges and their dismissal is too short to trigger the *Barker* analysis. See Pet. App. 34a. And respondent has always conceded that the delay between his indictment and trial, primarily a result of his pretrial appeals, is not material for speedy trial purposes. See 531 F.2d at 202; Pet. App. 19a n.2.[26] Assuming *arguendo*, however, that the entire pre-indictment period is relevant to the speedy trial calculation, we submit that the court of appeals misapplied the *Barker* factors and erred in finding a Sixth Amendment violation.

A. Under The Circumstances Of This Case The Delay Between Respondent's Military Arrest And His Indictment Was Not Unreasonable

The period of delay from respondent's military arrest to his indictment is sufficiently long to be considered "presumptively prejudicial." This conclusion, however, does not establish a constitutional violation; it only touches off an inquiry into balancing the other *Barker* factors. The next factor in the *Barker* analysis is the reason for the delay. The Court in *Barker* explained the

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[26] Judge Murnaghan, in his statement on denial of rehearing, identified the "offending" period of delay as October 1970-January 1975, the precise period that we have contended must be excluded from the speedy trial calculation (Pet. App. 48a).

consideration to be given to different causes of a delay (407 U.S. at 531; footnote omitted):

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered * * *. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

There is no contention that any delay in this case was a deliberate attempt to hamper the defense. The court of appeals acknowledged this (531 F.2d at 205-206), and respondent has conceded this point in this Court (75-1892 Br. in Opp. 13). The courts below have asserted that a major portion of the delay was attributable to "negligence" (531 F.2d at 207) or "bureaucratic indifference" (Pet. App. 7a), which this Court has classified as "more neutral reason[s]" that weigh "less heavily" in the speedy trial calculus. *Barker* v. *Wingo*, *supra*, 407 U.S. at 531. Even these descriptions, however, unfairly characterize the government's actions in this case. As the dissenters below pointed out (Pet. App. 20a-22a, 41a-42a), all but a small portion of the period between the dismissal of the military charges and the return of the indictment was spent in diligent efforts to solve a complex crime. Both military and civilian authorities performed exhaustive investigations of circumstantial evidence while prosecutors reviewed whether the evidence adduced warranted prosecution. The courts have recognized that the complexity of a case is a factor that justifies what would otherwise appear to be a long delay. See, *e.g.*, *United States* v. *Enright*, 579 F. 2d 980, 990 (6th Cir. 1978); *United States* v. *Dreitzler*, 577 F.2d 539, 549-550 (9th Cir. 1978), cert. denied, 440 U.S. 921 (1979).

A close examination of the period of investigation shows that the pre-indictment delay here was not excessive. See Pet. App. 21a-22a, 41a-44a. A lengthy military investi-

gation had concluded that the evidence available in October 1970 was not sufficient to warrant the court-martial of respondent. Accordingly, the CID engaged in a massive reinvestigation of the case, including attempts to locate the intruders described by respondent, which culminated in a 13-volume report transmitted to the Department of Justice in June 1972. Neither court of appeals panel seriously contended that the time required to complete this report constituted excessive delay.[27] After receipt of the report, several more months were required for Department of Justice personnel to digest its contents and suggest other lines of inquiry. In response to requests by the Department, the CID forwarded two supplemental reports, in November 1972 and August 1973. Later, when the case was brought before a grand jury, significant evidentiary discoveries were made that strengthened the prosecution's case (see page 7, *supra*). Thus, the period of delay criticized by the courts below was in fact principally a period of continuing efforts by the government to amass evidence and establish the identity of the murderer.

This is not to say that there was no unavoidable delay during this period; undoubtedly, the case could have been presented to the grand jury somewhat sooner than it was, if the decision-making process had been expedited.[28]

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[27] The court in *MacDonald I* found this CID investigation to be understandable and weighed against the government only the delay after June 1972. 531 F.2d at 206-207. The court below stated that "the most offending delay" was that between June 1972 and the commencement of the grand jury proceeding in August 1974 (Pet. App. 8a).

[28] In particular, the investigation of the murders was not materially advanced during the period of less than a year between the submission of the second supplemental CID report in August 1973 and the decision to empanel a grand jury. During this period, however, the decision to prosecute was being made as government officials debated whether the evidence and chances of obtaining a conviction warranted seeking an indictment.

But this noninvidious delay cannot be considered substantial in the circumstances of this case. See Pet. App. 42a. The complexity of this case and the severe consequences of seeking an indictment against respondent for these grave and extraordinary offenses justified the postponement of the grand jury investigation until the government had gleaned all available evidence and carefully considered all views as to the wisdom of seeking an indictment.[29] Thus, as the dissenters below concluded, the pre-indictment delay in this case was "well advised" (*id.* at 21a) and "not * * * excessive" (*id.* at 44a), and it carries little weight in the speedy trial calculation.

B. Respondent Made No Meaningful Demand for a Speedy Trial

The third of the *Barker* factors is the defendant's assertion of his right to a speedy trial. The court below erroneously gave strong weight to this factor, stating that respondent "consistently, after his discharge, contacted the Justice Department in an attempt to expedite the resolution of his case" (Pet. App. 8a).

This conclusion is based on a misunderstanding of the type of demand contemplated in *Barker*. Indeed, the court's conclusion highlights the incongruity of applying the Sixth Amendment analysis to the pre-indictment period involved here. Respondent could not demand a speedy

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[29] As the dissenters on rehearing pointed out (Pet. App. 43a), the government cannot be faulted for failing to prosecute as soon as one person took the position that it should seek an indictment. On the contrary, the government's hesitancy to proceed without giving careful consideration to other views "is to be commended, not condemned." *Ibid.* If, as the court of appeals suggests (*id.* at 8a), the prosecution is to be penalized for delay caused by resolving an internal debate over whether the case should be prosecuted, hasty prosecutorial decisions will be encouraged, which "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *United States* v. *Lovasco*, *supra*, 431 U.S. at 791, quoting *United States* v. *Ewell*, *supra*, 383 U.S. at 120.

trial between October 1970 and January 1975 because there were no charges pending against him that could be tried. See *Arnold* v. *McCarthy*, *supra*, 566 F.2d at 1383. Moreover, the correspondence from respondent's counsel to the Department of Justice in 1973 and 1974 cannot fairly be characterized as a demand that respondent be indicted.[30] These letters consisted of offers to submit respondent to interviews, neutral inquiries concerning the status of the government's investigation, and requests to terminate efforts to link respondent to the murders in light of the result of the Article 32 proceeding. See 531 F.2d at 201 n.6.

C. Respondent Has Not Demonstrated a Substantial Likelihood of Prejudice on the Basis of the Facts Developed During the Trial

The final factor in the *Barker* balancing analysis is prejudice to the defendant from the delay. Prejudice is to be assessed in light of the three interests of a defendant that the speedy trial right is designed to serve: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker* v. *Wingo*, *supra*, 407 U.S. at 532. It is manifest that the first two interests offer no support to respondent's speedy trial claim. Except for a short period of very limited restriction before the dismissal of the military charges in October 1970, respondent's freedom was never infringed prior to trial, and he was not hindered in pursuit of his personal and professional interests. Compare *id.* at 532-533. As to the second factor, although respondent undoubtedly suffered some anxiety and concern over the ongoing investigation, his anxiety was surely less

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[30] Of course, a suspect has no right to demand that an investigation be terminated or that he be speedily arrested or indicted. See *United States* v. *Lovasco*, *supra*, 431 U.S. at 790-796; *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966).

than that of a person awaiting trial against whom formal charges are pending.[31] The district court specifically found on this point that "[t]he record would not support a finding that [respondent] has suffered great anxiety and concern by reason of the pre-indictment delay in this case" (Pet. App. 55a).

The most serious form of prejudice is impairment of the defense at trial. As this Court explained in finding that respondent could not appeal the denial of his speedy trial motion before trial, *United States* v. *MacDonald*, 435 U.S. 850, 858 (1978), this facet of the inquiry requires a careful assessment of the facts of the case as they are developed at trial. An assessment before trial of impairment of the defense by reason of delay is only "speculative." *Ibid.* Thus, although the defendant need not show that he would have been acquitted but for the delay, he must show some reasonable basis for concluding that the delay significantly impaired his defense.[32] Yet apart from general allegations that witnesses' memories would be eroded, respondent's pretrial motions to dismiss on speedy trial grounds (J.A. 41-49) advanced no specific basis for his claim of impaired defense; moreover, in his post-trial motion to dismiss (J.A. 170), he made no reference to any aspect of the trial in which the delay allegedly impaired his defense. The district court, after noting

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[31] Because any individual subject to pending charges suffers anxiety and concern, this factor ordinarily does not weigh heavily in the *Barker* analysis. See, *e.g.*, *United States* v. *Hill*, 622 F.2d 900, 910 (5th Cir. 1980); *United States* v. *Van Dyke*, 605 F.2d 220, 226 (6th Cir.), cert. denied, 444 U.S. 994 (1979); *United States* v. *Noll*, 600 F.2d 1123, 1128 (5th Cir. 1979).

[32] For example, when the claim of prejudice is based on the unavailability of a witness, the defendant must show that the witness could have supplied material evidence for the defense. See *Jones* v. *Morris*, 590 F.2d 684, 687 (7th Cir. 1979); *Smith* v. *Mabry*, 564 F.2d 249, 253 (8th Cir. 1977), cert. denied, 435 U.S. 907 (1978). See generally *Fourth Circuit Review—Misapplication of the Constitutional Rights to a Speedy Trial*, *supra*, 38 Wash. & Lee L. Rev. at 593-595 nn.253, 257.

that it had been alert throughout the trial to detect the possible existence of prejudice resulting from the delay (Pet. App. 53a), found that respondent's ability to defend the case adequately was not impaired in any respect (*id.* at 55a-56a).

The contrary conclusion of the court of appeals is unsupported by the record. Despite this Court's instructions in *MacDonald*, the court below minimized the importance of the evidence as actually developed at trial, finding that it "confused rather than clarified the question of actual prejudice at trial" (Pet. App. 9a). Instead, the court rested its decision primarily on general speculation about problems that are always present when there is delay. The court conjectured that, given the possibility that during preparation for trial the prosecutors "helped fill lacunae of recollection" by reminding each witness of his earlier statements, "[t]he intervening period of over nine years rendered it virtually impossible for [respondent] to prove the recollection of each witness to see if they were fuller than or different from what he had stated when the statement was taken" (Pet. App. 10a).

This speculation by the court does not support its conclusion that respondent's defense was prejudiced by a period of unjustified government delay. First, even assuming that the court of appeals was correct in finding that the government "negligently" delayed for a two-year period, there would be no reason to ascribe to this period any loss of recollection sustained by witnesses over the nine-year period before trial. Moreover, nothing in the record supports the speculation that any testimony by prosecution witnesses was influenced by pretrial preparation and was not the result of independent recollection. Indeed, as the court acknowledged (*id.* at 16a), the prosecution's case consisted almost exclusively of circumstantial physical evidence and scientific testimony interpreting the evidence. The reliability of such evidence, based largely upon reports made contemporaneously with the analyses of the physical evidence, does not diminish

with the passage of time, nor does the ability of defense experts to challenge its significance.[33]

The court of appeals also observed that, as a result of the delay, respondent was likely to have been prejudiced by the "almost certain memory erosion" of all the witnesses (Pet. App. 14a). But this type of nonparticularized assertion of faded memories can be made whenever there is delay and provides no basis for a finding of prejudice in the context of a Sixth Amendment speedy trial claim. See, *e.g.*, *United States* v. *Edwards*, 577 F.2d 883, 889 (5th Cir. 1978); *United States* v. *Avalos*, *supra*, 541 F.2d at 1116 (collecting cases). The only specific item of prejudice relied upon by the court below is its assertion that the delay was the probable cause of Helena Stoeckley's testimony that she could not recall her whereabouts during the time the murders were committed. Because Stoeckley had made vague and contradictory remarks to third parties on several occasions in the past that indicated that she was present in respondent's apartment during the murders,[34] the court found that there was a "substantial possibility" that, had the trial been conducted earlier, Stoeckley "would have testified to being present in the MacDonald home during the dreadful massacre," and therefore the testimony she gave at trial "had a great potential for prejudice" (Pet. App. 11a).

The court's speculation that the delay was the probable cause of Stoeckley's failure at trial to remember her

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[33] Respondent presented the testimony of five expert witnesses who challenged aspects of the testimony of the government's expert witnesses (*e.g.*, Tr. 4900, 4921-4927; 5006-5072; 5128-5218, 5249-5290; 5333-5370, 5405-5415, 5417-5434).

[34] Stoeckley's statements to various individuals suggesting her possible involvement in the murders are set out at pages 17-19 n.* of respondent's Brief in Opposition. Stoeckley also made several remarks to many of the same individuals disclaiming her involvement in the murders or any recollection of her whereabouts on that night. See J.A. 14-15, 22 (Posey); J.A. 133 (Gaddis); J.A. 138-141 (Brisentine); J.A. 152-153 (Beasley).

activities on the night of the murders does not withstand analysis. First, it defies common sense to conclude that the mere passage of time could erase the memory, if any in fact existed, of so significant an event as being present at these murders. Moreover, as the dissenters on rehearing found (Pet. App. 46a), the record clearly establishes that Stoeckley's memory gap existed from the outset; it was not "a condition which developed as the result of any delay in either the investigation or the prosecution of [respondent]."

Stoeckley herself explained at trial that her inability to recall her activities during the early morning hours of February 17, 1970, was caused by her consumption the previous evening of large quantities of drugs (J.A. 52-54). This explanation is corroborated by earlier statements she had made shortly after the murders and in several subsequent conversations with acquaintances and investigators. The day after the murders, she stated to a local policeman that "[i]n my mind, it seems that I saw this thing happen," but she also explained that she was "heavy on mescaline" and could not recall anything that happened on the night of the murders (J.A. 149, 152-153). About one week later, Stoeckley told William Posey, her neighbor, that she could not recall what she had done or where she had been during the time of the murders because she was "stoned out that night" (J.A 11-15). She reiterated these statements in a subsequent conversation with Posey shortly thereafter (J.A. 22). When interviewed by a CID agent in August 1970, Stoeckley stated that she could not recall her activities on the night of February 16-17, other than driving aimlessly with a male companion, because she had been using marihuana (J.A. 24-25). In April 1971, Stoeckley told an investigator that she did not remember her whereabouts during the early morning hours of February 17 due to a "mental block" and that during that period she was disoriented as the result of drug usage (J.A. 138-139). Thus, the record indicates that Stoeckley's testimony at trial was the result of a pre-existing gap

in her memory apparently caused by drug abuse. See Pet. App. 25a-27a.[35] As Judge Bryan found (*id.* at 25a-26a), "[n]othing in the record * * * warrants the assumption that Stoeckley would have or could have given the testimony the majority would ascribe to her had the Government secured its indictment earlier." [36]

In sum, application of the *Barker* factors here does not indicate a speedy trial violation. The bulk of the delay was justified by the complexity of the investigation and the gravity of the crimes, and only a small portion of the delay could be characterized as even negligent. More importantly, the record reveals no prejudice whatsoever to the defense. In these circumstances, it is clear that the court of appeals erred in dismissing the indictment. Respondent was found guilty beyond a reasonable doubt of three murders. To "absolve[] him forever of his hideous offense[s]" (Pet. App. 18a) because of a lack of diligence by the prosecution prior to indictment is not a step to be taken lightly. The determination of Congress that no statute of limitations is applicable to first-degree murder (18 U.S.C. 3281) reflects the view that society's interest in convicting the perpetrator of

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[35] Respondent has pointed to some extra-record post-trial statements allegedly made by Stoeckley that also suggest her possible involvement in the murders. Br. in Opp. 21 n.*, 38A-40A. These statements provide further evidence from Stoeckley herself undercutting the suggestion that her memory gap at trial was a result of the delay. See Br. in Opp. App. 39A.

[36] Because respondent never alleged in his speedy trial motions that he was prejudiced by Stoeckley's memory gap, the trial court did not address the significance of her testimony in connection with its ruling on the speedy trial motion. In connection with its ruling that Stoeckley's prior out-of-court statements were properly excluded, however, the court made the following assessment (Pet. App. 58a):

> The court gained the unmistakable impression which it believes was shared by the jury that this pathetic figure was suffering from drug-induced mental distortion and that she could be of no help to either side in the case.

such an offense is so substantial that prosecution is not to be foreclosed regardless of the passage of time. In the absence of any prejudice from the delay, there is certainly no constitutional impediment to this legislative judgment.[37]

CONCLUSION

The judgment of the court of appeals should be reversed.

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AUGUST 1981

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[37] It follows, *a fortiori*, from the analysis above that respondent's Fifth Amendment due process rights were not violated by the delay. As we noted in our petition (Pet. 19-22), pre-indictment delay violates the Fifth Amendment if it both causes actual prejudice to the defense and is the product of fundamentally unfair government conduct—for example, if the delay is an intentional device to gain a tactical advantage over the accused. See *United States* v. *Lovasco*, *supra*, 431 U.S. at 788-796 & n.17; *United States* v. *Marion*, *supra*, 404 U.S. at 324; see also, *e.g.*, *United States* v. *Elsbery*, *supra*, 602 F.2d at 1059. The analysis of prejudice in the Sixth Amendment context (pages 37-42, *supra*) makes clear that respondent cannot meet the more stringent "actual prejudice" test of the Fifth Amendment. Indeed, the court below implicitly acknowledged that no actual prejudice had been shown (Pet. App. 11a, 16a). Moreover, as we noted earlier (page 34, *supra*), respondent and the court of appeals have conceded that the delay here was not the result of intentional government action designed to hamper the defense.

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